No. 11832

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHESTER WALKER COLGROVE, Trading and Doing Business Under the Firm Name of COLUSA REMEDY COMPANY, and COLUSA REMEDY COMPANY, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

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OPENING BRIEF ON APPEAL.

This is an appeal from judgments and sentences pronounced against Chester Walker Colgrove, trading and doing business under the firm name of Colusa Remedy Company and Colusa Remedy Company, a Nevada corporation, defendants.

The charges grow out of the sale of Colusa Natural Oil in drug stores and advertising material published in local daily newspapers setting out where the product might be obtained from drug stores and doctors.

This brief challenges the right of the court to issue an injunction limiting newspaper advertising as not within the authority granted to the court by Congress. Other fundamental issues are also presented by this appeal.

Jurisdiction.

Jurisdiction—Title 28, Section 225, U. S. Code, and 21 U. S. C. A., Section 332, and 28 U. S. C. A., Section 387, and the Rules of Criminal Procedure of the rules of the court of the United States.

The United States Attorney for the Southern District of California filed an "Information Re Contempt (Criminal)" under Sections 21 U. S. C. A. 332(b) and 28 U. S. C. A. 387, in the United States District Court for the Southern District of California, Central Division, before Hon. Judge William C. Mathes, U. S. District Judge, on October 2, 1947 [R. 2-15].* Judge Mathes issued an Order to Show Cause re Criminal Contempt" on October 3, 1947 [R. 17, 45 ff.]. A hearing upon that Order was held on December 8, 1947 [R. 27]. A "trial" was held on December 19, 1947 [R. 27, 55 ff.]. Judgment of conviction and sentences were entered on January 5, 1948 [R. 34-38]. Notice of Appeal was filed on January 12, 1948 [R. 39-40].

Statutes Involved.

The Federal Food, Drug and Cosmetic Act (21 U. S. C. A. 301 ff.) provides (21 U. S. C. 321):

> "Definitions:
>
> "For the purposes of this chapter—
>
> * * * * * * * *
>
> "(k) The term 'label' means a display of written, printed or graphic matter upon the immediate container of any article; * * *
>
> * * * * * * * *

*The references preceded by "R" are to the printed record on appeal herein.

"(m) The term 'labeling' means all labels and other matter, printed or graphic matter (1) upon any article or any of its containers or wrappers, or

"(2) accompanying such article."

(21 U. S. C. 331):

"Prohibited Acts:

"The following acts and the causing thereof are hereby prohibited:

"(a) The introduction or delivery for introduction into interstate commerce of any * * * drug that is * * * misbranded."

(21 U. S. C. 333):

"Penalties—Violation of Section 331:

"(a) Any person who violates any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment * * * or a fine * * * or both * * *."

(21 U. S. C. A. 352):

"Misbranded Drugs and Devices:

"A drug or device shall be deemed to be misbranded—

"(a) If its labeling is false or misleading in any particular.

* * * * * * * *

"(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users."

Rule 10, Federal Rules of Criminal Procedure:

"Rule 10. *Arraignment.*

"Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

Rule 11, Federal Rules of Criminal Procedure:

"Rule 11. *Pleas.*

"A defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Rule 42, Federal Rules of Criminal Procedure:

"Rule 42. *Criminal Contempt.*

"(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

"(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allow-

ing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Questions Presented by This Appeal.

1. Whether the original order of the District Court of the United States was a valid order?

2. Whether the District Court had jurisdiction under the orders so issued to find the petitioners in contempt of court?

3. Whether the verdicts of the District Court are contrary to the law and the evidence?

4. Whether the District Court erred in holding that the petitioners were guilty of criminal contempt where—according to the court's own determination—there was actual compliance with the orders of the court but not "spiritual" compliance?

5: Whether the District Court misconstrued the language of the statutes regarding advertising?

6. Whether the statute forbids newspaper advertisements when the same do not accompany the drug?

7. Whether advertisements in newspapers come within the protection of the First Amendment to the Constitution of the United States and are not prescribed by the statute?

8. Whether the sentences were null and void where there were consecutive sentences?

9. Whether the judgment on the first count, if valid, rendered all the other counts *res judicata?*

Statement of the Case.

On February 24, 1947, the District Court below, the Honorable Judge Mathes presiding, issued a preliminary injunction against appellants, restraining them

> "from introducing or delivering for introduction into interstate commerce, in any form or manner, the product known as 'Colusa Natural Oil,' or any like product, without a label containing *specific* directions for the use of such product in the treatment of all conditions, ills and diseases for which such product is prescribed, recommended, and suggested, in the advertising material disseminated or sponsored by or on behalf of the defendants or either of them; which directions shall include the quantity of dose (including quantities for (2) persons of different ages and different physical conditions) to be taken or applied in the treatment of each of such conditions, ills and diseases, as well as the recommended frequency and

duration of administration or application of such dosage" (italics ours) [R. 2-3].

On April 23, 1947, the court made the injunction permanent, changing, however, the word "specific" to "adequate" [R. 3].

Thereafter appellants shipped Colusa Natural Oil in interstate commerce on various dates, labeled as follows [R. 4, 22]:

> "A natural unrefined petroleum oil intended for use in the treatment of Psoriasis, Eczema, Athlete's Foot, and Leg Ulsers.
>
> "Directions: Apply to affected parts and rub it in thoroughly morning and night. For open sores, saturate cotton pad with oil and bind on by gauze. Change to fresh dressing morning and night. For tender skin oil can be diluted 50% with olive (3) oil. Continue treatment until skin is smooth and comfortable. * * *"

Appellants also placed advertisements in local newspapers in various states concerning their product [R. 20].

It is by reason of the advertisements in local newspapers in various states that the court found the petitioners guilty of contempt.

On October 2, 1947, the United States Attorney for the Southern District of California filed in the District Court of the United States for that district, Central Division, before the Honorable Judge William C. Mathes,

United States District Judge, an "Information re Contempt (Criminal)" [R. 2-15], in nine "counts," each of which charged a separate act or series of acts alleged to be "in criminal contempt" of a temporary or permanent injunction previously issued against appellants by that Judge.

On October 3, 1947, Judge Mathes issued an order to show cause directed to appellants, requiring them to appear before him and show cause why they should not be held in criminal contempt of that court [R. 16-16]. On December 8, 1947, a hearing was held before that Honorable Judge upon said order to show cause, and the Judge concluded that appellants had not purged themselves of contempt, and ordered that they stand trial [R. 17].

Appellants were tried before Judge Mathes, having waived a jury, on December 19, 1947 [R. 27, 55 ff.], and were found guilty of contempt as charged in counts one to eight, inclusive, of the Information, and not guilty as to count nine [R. 27, 78].

In finding appellants guilty, the court stated that appellant Colgrove was "technically, literally correct in the literal reading" of the injunctions [R. 77]. The court further stated that the injunction should have been worded differently, in the disjunctive rather than in the conjunctive, and that in order to violate the injunction as written, it would have been necessary for the advertising material involved (see *infra*) to contain a conjunction of various matters [R. 78]. The court, stating that the appellant Colgrove "attempted to obey the words

but not the spirit of the prohibition" in the injunctions, nevertheless found appellants guilty of criminal contempt [R. 78].

The court sentenced on January 5, 1948, appellant Colgrove to fines totalling $4,000 and to imprisonment for a total period of six months, and then suspended the jail terms and placed him on probation for five years [R. 37-38]. The corporation was fined $5,000 [R. 39].

This appeal followed, to have the issues determined in this court.

Judgment of conviction and sentence, which recites in part that appellants "had been convicted" after trial "of the offense" of shipping certain products in interstate commerce and in disregard of the injunctions, was entered by the court on that date [R. 34-38]. While the judgment also recites that conviction was had after trial upon a "plea of not guilty," no pleas were in fact taken or offered, as far as is shown by the record on appeal.

ARGUMENT.

POINT I.

The Original Order of the District Court of the United States Was Not a Valid Order.

The court was without jurisdiction to make an order restraining the appellants from prescribing, recommending, or suggesting any advertising material designated by or on behalf of the defendants, or either of them, which advertising material

(1) Was not placed upon any article or any of its contents or labels, or

(2) Did not actually accompany such article.

Title 21, U. S. C., Section 321, says: "The term label means a display of written, printed, or graphic matter *upon the immediate* container of any article." Therefore, the court was without jurisdiction to issue an injunction of the kind or character which it did issue [R. 23], and which was therefore null and void.

Where an order is made which is null and void, the same may be disregarded. (See *Re Sawyer,* 124 U. S. 200, 31 L. Ed. 402; *Ex parte Fisk,* 113 U. S. 713, 28 L. Ed. 1117; *Ex parte Rowland,* 104 U. S. 604, 26 L. Ed. 861.)

It is for the legislature and not the courts to determine the statute and extent to which the statute governs and one cannot be held criminally liable for violating either a statute or a regulation pursuant thereto for which there is no statutory authority. The mode prescribed by the statute is the measure of power. (*Viereck v. United States,* 318 U. S. 236, 87 L. Ed. 734.)

A. Is the Order Void as Being Without the Jurisdiction of the Court? The Complaint in the Civil Case Was for an Injunction Under 21 U. S. C.(f)(1) and the Order and Injunction Was Drawn Under Both (1) and (2). Did the Court in the Contempt Case Exceed Its Jurisdiction in Finding Defendants Guilty of Lack of "Specific" Directions When Only "Adequate" Required?

Disobedience of a void order or one issued by a court without jurisdiction of the subject-matter and parties litigant is not contempt.

Beauchamp v. U. S., 76 F. 2d 663 (C. C. A. 9).

A decree entered with jurisdiction must be obeyed as entered, and if its terms read more broadly than defendant intended in consenting thereto, time and manner of avoiding that breadth was by objection to the decree before its entry and not by disobedience.

N. L. R. B. v. American Mfg. Co., 132 F. 2d 740 (cert. den. 319 U. S. 743).

The civil case out of which the alleged contempt arose (No. 5992-WM—Civil in the District Court) was for an injunction under Section 352 of Title 21, U. S. C., subdivision (f)(1). While the complaint prays for an injunction under (f)(1) only, the injunction was drawn to include (f)(2). Therefore, I am quoting below the entire subsection:

"§352. Misbranding drugs and devices.

"A drug or device shall be deemed to be misbranded— * * *

"(f) Directions for use and warnings on label.

"Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use

in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: Provided, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Administrator shall promulgate regulations exempting such drug or device from such requirement."

This statute, in both subdivisions, require but "adequate" labeling. The preliminary injunction required "specific" directions as to the use of the product. This was changed to "adequate" directions in the final injunction [R. 3]. But this confusion continued throughout the entire contempt proceedings. Newspaper advertising cannot be considered "labeling." The court exceeded its jurisdiction in including "advertising material" in its injunction when the statute only requires adequate labeling.

The information on which the defendants were tried alleges the lack of "specific" directions in counts one and five; of "adequate" directions in counts two, three, six, seven, eight and nine and of "specific or adequate" directions in count four.

The trial court found that the defendants failed to give "specific" directions [R. 34 and 36] as shown by its remarks on page 77 of the record:

> "The Court: The defendant is technically, literally correct in the literal reading of the restraining order, that the label be required to contain *specific* directions for the use of the product—I am abbreviating that—in the treatment of all ills for which such product is prescribed, recommended, and suggested.

> "Read literally, the prohibition is against introducing into interstate commerce drugs which do not contain a label containing *specific* directions for its use in connection with all ills for which it is prescribed and recommended and suggested in the advertising material disseminated by the defendant. * * *"

If all that the statute or the injunction requires is "adequate" directions as to the use of the product the defendants cannot be found in contempt for failing to give "specific" directions. General directions for the use of a product such as the one involved in this case may be "adequate" while not "specific" whereas, with a different product which might be dangerous to health if not properly used or if used by a child instead of an adult the same directions would not be adequate. There is no contention on the part of the government that the product was dangerous to health or that the use is different for children than for adults. In fact, the same directions apply to both and also apply to any disease prescribed, recommended or suggested in the advertisement.

The directions were adequate for the reason that all of the diseases mentioned are of the same kind. The principles of *Ejusdem Generis* or *Noscitur a Sociis,* to use legal terminology, would apply.

The American Illustrated Medical Dictionary (Dorland) 20th Ed., defines eczema as "an inflammatory skin disease with vesiculation, infiltration, watery discharge, and *the development of scales and crusts.* The lesions vary much in character, and the disease is frequently attended with restlessness and fever and other symptoms of constitutional disturbance, as well as by local *itching* and *burning.*" This definition is followed by the particularization of forty-four different types of eczema.

The definition of psoriasis is "a skin disease of many varieties, characterized by the formation of *scaly red patches* on the extension surfaces of the body." This definition is followed by a list of nineteen different types of psoriasis including psoriasis annularis which is defined as "psoriasis in *ring shaped patches";* and psoriasis nummularis which is "psoriasis in *circular patches* which resemble small coins."

Athlete's foot is defined by the same author as *"ringworm* of the feet; a dermatophytosis of the skin of the feet, characterized by the formation of vesicles, redness and the development of cracks between the toes, resulting in itching, pain, and some disability."

Poison ivy is defined as "Rhus Toxicodendron—or poison ivy, a poisonous species of sumac. The leaves or juice, when applied to the skin, cause a severe dermatitis and internal poisoning."

Poison oak is not even defined. Under "poison oak" the dictionary says "see Rhus Diversiloba" and under that term is the statement "is poison oak."

An ulcer is defined as "an open sore, other than a wound," etc. This is followed by 128 different types of ulcer which includes "decubitis ulcer"—a *bedsore,* an ulceration caused by prolonged pressure in a patient confined to bed for a long period of time.

A study of the above definitions will disclose that practically every term used in the advertisement comes within one or the other of the terms used in the main portion of the advertisement, to-wit psoriasis, athlete's foot, eczema or ulcers. Every one is but an irritation of the skin. Every one should be treated in the same manner; exactly as directed on the label. What more could be expected of the defendants?

Should they have listed the 44 different types of eczema in order to show that it would relieve burning and itching? Should they have listed the 19 different types of psoriasis in order to show that it could be used for scaly red patches on the skin and ringworm. Should they have specified both athlete's foot and ringworm when athlete's foot is but a form of ringworm? I maintain that the directions for use were more than adequate, and cover all of the ills, conditions and diseases for which the product is prescribed, recommended and suggested.

B. The Injunction Order Was Uncertain and Indefinite and Therefore Null and Void.

An injunction order, similar to any Administrative Order, must be so definite and certain that anyone would clearly come within its language and meaning or it is null and void.

> *M. Kraus & Bros. v. United States,* 327 U. S. 614, 90 L. Ed. 894.

In *Kraus & Bros. v. United States,* 327 U. S. 614, 90 L. Ed. 894 at page 899, the court said:

> "The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.
>
> In applying this strict rule of construction to the provisions adopted by the Administrator, courts must take care not to construe so strictly as to defeat the obvious intention of the Administrator. Words used by him to describe evasive action are to be given their natural and plain meaning, supplemented by contemporaneous or long-standing interpretations publicly made by the Administrator. But patent omissions

> and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. **The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. United States v. Resnick, 299 U. S. 207, 81 L. Ed. 127, 57 S. Ct. 126."**

So a court injunction must likewise be set forth with clarity by express words.

One may not be punished for disobedience of an order which does not definitely prescribe what he is to do.

> *N. L. R. B. v. New York Mdse. Co.,* 134 F. 2d 949.

A person acting in good faith and with due respect to the court is not guilty of contempt if placed in a dilemma by an ambiguous order of the court.

> *N. L. R. B. v. Bell Oil and Gas Co.,* 98 F. 2d 405, rehearing denied, 99 F. 2d 56.

Before a person should be subjected to punishment for violating a command of the court, the order should inform

him in definite terms regarding duties thereby imposed upon him.

Berry v. Midtown Service Corp., 104 F. 2d 107.

The decree cannot be expanded by implication and the facts found must constitute a *plain violation* of the decree.

Denver-Greeley Valley Water Users Assn. v. McNeil, 131 F. 2d 67;

Cohn v. Kramer, 136 F. 2d 293;

Terminal R. Assn. of St. Louis v. U. S., 266 U. S. 17;

Lustgarten v. Felt & Tarrant Mfg. Co., 92 F. 2d 277.

POINT II.

The Injunction of the Court Below Was Beyond Its Powers Under the Food and Drug Act.

The extent of the power of the court below to enjoin appellants in their acts with reference to their shipment of drugs in interstate commerce is controlled by the provisions of the Food and Drug Law (*supra*). That law, as applicable here, prohibits the introduction into interstate commerce of any drugs which are misbranded, that is, not properly labelled as defined under that act (see *supra*).

Nothing in that Act indicates that Congress desired its prohibitions to operate upon newspaper advertisements. In fact, the writings referred to in that Act relate specifically to advertising material *upon the package containing the drug or accompanying the package.*

This Court has recently had occasion to decide that advertising material, which was expressly designed to

be distributed in conjunction with the product involved, did not accompany that product within the meaning of the Act when the advertising material was sent days after the shipment in interstate commerce of the drug itself.

Alberty v. United States, 159 F. 2d 278 (C. C. A. 9, 1947).

See also

Research Laboratories v. United States, 126 F. 2d 42 (C. C. A. 9), cert. den. 317 U. S. 656.

Here the advertisements dealt with in the injunction were advertisements in newspapers, which did not accompany the drug, and which were not even shown to have been in interstate commerce at all. The power of the court below to enjoin acts of appellants with respect to advertisements was no broader than the prohibitory terms of the statute itself. Since the statute's proscriptive and mandatory terms are specifically with relation to the label on the package or advertising material *accompanying* the package, the court below could only prohibit or require acts on the part of appellants which were within the scope of the law from which the court derived its power to enjoin. By including requirements in its injunction as to advertising in newspapers which did not accompany the product in interstate commerce, the court below plainly acted beyond its jurisdiction.

See, *c. g.,*

Hygrade Food Products Corp. v. United States, 160 F. 2d 816 (C. C. A. 8, 1947).

Cf. Sullivan v. United States, 161 F. 2d 629 (C. C. A. 5, 1947).

And since the contempt was predicated upon acts of appellants with reference to the *newspaper advertisements,* the jurisdiction of the court to issue its injunctions, and later to find appellants in contempt, did not exist here. At the hearing upon the order to show cause, the court asked [R. 53]: "Is it the Government's contention that this advertisement becomes in effect a part of the label."

Thereupon counsel for the Government replied [R. 53]:

> *"Not necessarily a part of the label, your Honor, no;* but it is in conflict with the court's order heretofore entered, which is, pursuant to the statute, that the defendants *are not in their advertising,* after these injunctions, to recommend, suggest or prescribe this product for any conditions, *any of the disease conditions* other than those named on the label." (Italics ours.)

It is undisputed that appellant deleted the word "acne" from the advertisements [R. 30, 33] after the first injunction was issued, because "acne" was not referred to on the labels [R. 59-60]. Nothing more was in fact required of appellants under the injunctions in this case.

Aside from this fact that appellants complied in full as required of them under the terms of the injunctions, there are the further points, discussed elsewhere in this brief, which demonstrate that the injunctions were beyond the powers of the court below, and were improper for other reasons.

POINT III.

The Attempt to Control Newspaper Advertising by Injunction Is Contrary to the Constitution of the United States.

The Constitution of the United States guarantees freedom of the press.

See *e. g.*

Constitution, United States, First Amendment;

Stromberg v. California, 283 U. S. 359;

Grosjean v. American Press Co., 297 U. S. 233;

Schenck v. United States, 249 U. S. 47;

Jamison v. Texas, 318 U. S. 413.

That constitutional guaranty implies freedom from previous restraints upon publication.

Patterson v. Colorado, 205 U. S. 454;

Near v. Minnesota, 283 U. S. 697;

Dailey v. Superior Ct., 112 Cal. 94;

Grosjean v. American Press Co., 297 U. S. 233.

And this freedom is safeguarded not only from legislative action, but also from judicial restraint.

E. g.,

Near v. Minnesota, 283 U. S. 697;

Dailey v. Superior Ct., 112 Cal. 94;

Empire Theatre Co. v. Cloke, 53 Mont. 183, 163 Pac. 107.

Here the trial court exercised its injunctive power in an attempt to place a previous restraint upon publication. Moreover, the court did not even limit its injunction to

advertising matter in interstate commerce. In punishment of an alleged disregard of that restraint, the court held appellants in contempt.

It is plain, we submit, that the court's actions were contrary to the provisions of the Constitution.

Moreover, even under existing statutes, irrespective of constitutionality, the court below was clearly in error in seeking to control newspaper advertisements by appellants. Newspaper advertising is within the exclusive province of the Federal Trade Commission. (See Secs. 12 and 13 of the Federal Trade Commission Act (15 U. S. C. A. 52, 53).)

Nothing in the Food and Drug Act confers jurisdiction upon a federal court to deal with that subject matter.

No proceeding was had here under the Federal Trade Commission Act.

The Federal Trade Commission, also, proceeds in the District Courts of the United States by its own attorneys, not through the United States Attorney, to enforce the provisions of its Act. (15 U. S. C. A. 53(a).) No such proceeding under that law has been brought here.

Furthermore, there is no evidence in this case that any of the newspapers in which appellants' advertisements appeared, were ever mailed or in interstate commerce. Such a showing is required, of course, even under the Federal Trade Commission Act. And there is no proof in this case that any part of the advertisements by appellants was false or misleading.

Under the Federal Trade Commission Act, that commission can determine falsity only on the basis of proper and adequate proof.

See:

15 U. S. C. A. 55;

Charles, etc., v. Federal Trade Commission, 143 F. 2d 676 (C. C. A. 2);

Aronberg v. F. T. C., 132 F. 2d 165;

American Medicinal Products v. F. T. C., 136 F. 2d 426 (C. C. A. 9);

Miles Laboratories v. F. T. C., 140 F. 2d 683, cert. den. 322 U. S. 752.

And such a conclusion can only be reached in a duly constituted and conducted hearing before that agency. None was here shown to have been held.

An Injunction Cannot Be Used to Deny One His Constitutional Rights of Free Speech and Freedom of the Press.

"Unless the right of free speech is enjoyed by employers as well as by employees, the guaranty of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person."

Midland Steel Products Co. v. N. L. R. B., 113 F. 2d 800 at page 804 (C. C. A. 6).

"Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens (persons) by the First Amendment."

N. L. R. B. v. Ford Motor Co., 114 F. 2d 905, 915 (C. C. A. 6), cert. den. 312 U. S. 689.

"A contempt proceeding may serve in appropriate circumstances as the efficient means for vindicating a court's judgments or decrees, but 'it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality.' See Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U. S. 287, 298, 61 S. Ct. 552, 555, 85 L. Ed. 836, 132 A. L. R. 1200 (concerning the rights under the Fourteenth Amendment). * * *

"* * * The right to free speech in the future is not to be forfeited because of misconduct in the past. * * * This must necessarily be so if freedom of speech which is 'among the fundamental personal rights and liberties' (Lovell v. City of Griffin, 303 U. S. 444, 450, 58 S. Ct. 666, 668, 82 L. Ed. 949) is to be maintained inviolate. That the right is to be so maintained calls for no argument."

Edward G. Budd Mfg. Co. v. N. L. R. B., 142 F. 2d 922 at page 928.

POINT IV.

The Verdicts and Judgment Are Contrary to the Law and the Evidence, and Should Be Set Aside.

A. The Degree of Proof Required in Criminal Contempt Is "Beyond a Reasonable Doubt."

In prosecution for criminal contempt evidence must show guilt of accused *beyond a reasonable doubt.*

Russell v. U. S., 86 F. 2d 389;

Schmidt v. U. S., 115 F. 2d 394.

If a respondent is answering a charge of criminal contempt, he is presumed to be innocent and must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself.

Parker v. U. S., 153 F. 2d 66;

In re Eskay, 122 F. 2d 819;

Gompers v. Bucks, 221 U. S. 418;

Michaelson v. U. S., 266 U. S. 42.

Contempt of court is a grave thing and the court is not disposed to engage in strained construction to spell out some theoretical abstract violation of the court's order.

N. L. R. B. v. Standard Trouser Co., 162 F. 2d 1012.

The last case cited is a civil contempt where the degree of proof required is only a preponderance of the evidence. In a criminal contempt with the presumption of innocence and proof beyond a reasonable doubt required the court should be even more strict in the degree of proof required. See the court's remarks, quoted *supra,* on page 77 of the record where the court admits that the defendants were

literally correct in their interpretation of the court's order. This also ties into the remarks and cases cited under the subdivision above re UNCERTAINTY AND INDEFINITENESS OF THE INJUNCTION.

In connection with the proof in this case see:

United States v. 50¾ Bottles of Sulfa-Seb, et al., 54 F. S. 759,

where it was held in a libel proceeding involving misbranding of certain drugs that evidence consisting of letters received from purportedly satisfied customers to questionnaires mailed out by claimants was inadmissible as hearsay. The testimonials published with the advertisement were unsolicited, couched in untechnical language and as shown *supra* the language used in practically all instances is used in the technical definition of the terms used in large type.

The evidence does not meet the test of guilt beyond a reasonable doubt.

It is elementary that in a criminal contempt proceeding, as in a criminal cause, findings of guilt must be based upon evidence which shows such guilt beyond a reasonable doubt, and the burden of proof is on the prosecution.

See, *e. g.*,

Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. Ed. 797.

No such showing can be found in this case.

The evidence here demonstrated that, in a field of legal interpretations and constructions of technical terms contained in the Food and Drug Act and in the injunctions of the court, appellant Colgrove reached a fair conclusion as to what was required of him, and acted accordingly

[R. 63], but the conclusion ultimately turned out to be different from that reached by the court upon the trial [R. 56-66, 68, 71-73, 77-79]. A question of interpretation was involved; not a criminal disregard of the mandate of a court.

That appellant was not unreasonable in his interpretation of the injunction, was indicated by the trial judge himself, the judge who had issued the injunction in the first instance, when he said [R. 77] that "the defendant is technically, literally correct in the literal reading of the restraining order."

The court continued:

> "So, literally read, it is true that in order to violate the language of this injunction it would be necessary for the advertising material to prescribe and recommend and suggest the use of the product for the treatment of a condition or an ill or a disease not referred to in the label." [R. 78.] * * * I think the injunction should, possibly, have been worded in the disjunctive instead of the conjunctive." [R. 78.] * * * "My view is that defendant attempted to obey the words but not the spirit of the prohibiton." [R. 78.]

It is clear, we submit, that there is no evidentiary basis beyond a reasonable doubt of a criminal disregard of the injunction of the court below; for it is only "one who defies the public authority and *wilfully* refuses his obedience," who is guilty of contempt. *United States v. United Mine Workers,* 91 L. Ed. 884, 918 (italics ours). And there is similarly no basis for the conclusion, reached by the trial court upon the hearing upon the order to show cause [R. 53], that appellant Colgrove had not purged himself of criminal contempt.

B. Moreover, Even Aside From the Facts Discussed Above, Other Evidentiary Defects Are Present in the Record.

(1)

There is no evidence, for instance, that the label or the advertising involved in the case, and upon which the findings of the court below must rest, were in use by appellants on the date of the hearing or the trial below.

The record demonstrates [R. 53] that the trial court merely *assumed* that the label and the advertising were then in use. The court stated [R. 53]:

> "Is it still being used, that type of advertisement? There is no showing it is not still being used. *I assume it is and the label is.*" (Italics ours.)

No citation of authority is required for the proposition that a criminal contempt proceeding or a criminal cause cannot be predicated or proceed upon findings of positive facts made on the basis of assumptions based upon absence of proof. And no finding of guilt in either a criminal contempt proceeding or in a criminal cause, both requiring proof beyond a reasonable doubt, can be bottomed upon such "evidence."

(2)

Then, there is nothing in the record to show that the label was not sufficiently specific in its directions for use of the contents. No proof was offered by the Government to support its contention of misbranding and no proof was offered to show that the label did not comply with the law.

The label on its face [see *e. g.* R. 4] bears specific "Directions" for use. Nothing in the record shows that these directions were either inadequate or misleading, either as to the conditions mentioned directly on the label, or even

those which the Government contended were additional conditions, allegedly mentioned in the newspaper advertisements. As far as the record shows, the directions for use contained on the label, are complete and adequate.

As the court below remarked [R. 73]: "This is a field where, as I understand it, medical opinion lacks a great deal of certainty." Criminal contempt findings should be based on something more substantial than a resolution of conflicting views in an uncertain field.

(3)

While the Government apparently contended below that the conditons referred to in the newspaper advertisements were additional to those mentioned on the drug label, the record is devoid of proof to that effect.

On the contrary, positive uncontradicted proof is present in the record that all conditions for which the drug here might be used, are fully covered by the terms on the label.

Thus appellant Colgrove testified without contradiction [R. 59, 62-63] that those conditions which the Government claimed were mentioned additionally in the advertisements, were in fact the same as those enumerated on the label; that he had the label reprinted after the first injunction was issued to comply with its terms as he understood them; and that he did everything within his power and in good faith to conform to the court's requirements [R. 63].

It is clear that this is "a field in which, apparently, medical men differ widely. It is a field in which remedies and certainty of treatment is not very satisfactory," as the court said below [R. 80]. Plainly no basis for a finding of criminal contempt existed in this case.

Without going into further detailed discussion of the evidence, or rather lack of evidence necessary to sustain the judgment below, we submit that the Government has failed to meet the test of guilt beyond a reasonable doubt, and that the conviction here should be reversed on that ground.

POINT V.

The Procedure and Proceedings Were in Violation of Due Process of Law Guaranteed by the Fifth Amendment to the Constitution of the United States; the Judgments Are a Nullity and Are Void.

The judgments are void. The entire proceedings in this case were a hotch-pot. While the information is labeled "Re Contempt (Criminal)" [R. 2], they were neither criminal nor civil; they were neither fish nor fowl; they were neither animal nor vegetable.

We take it that in a criminal contempt proceeding that the Rules of Criminal Procedure, as set down by the rules, must be complied with or the proceedings are a nullity.

Here the proceedings started out as a civil proceeding with an Order to Show Cause being issued against the defendants [R. 16]. This, of course, followed the issuance of the information [R. 2] upon the appearance of the defendants (by defendants, that is the corporations and the defendant Colgrove) "to show cause why they should not be punished for contempt" [R. 17].

The court found that the defendants had not purged themselves of contempt and set the cause for trial [R. 17].

There was no arraignment and no plea.

Without an arraignment or without plea a criminal proceeding has not taken place and the procedure and proceedings are null and void.

A. The Rules of Criminal Procedure Must Be Read and Considered Together.

Arraignment and pleas have always been one of the safeguards of criminal procedure and could not be eliminated even by rules. Therefore the judgments were null and void.

Due process was not complied with in accordance with a Rule of Criminal Procedure covering criminal matters which requires an arraignment, plea and customary procedures consistent with criminal cases.

B. Appellants Were Denied a Trial in the Full Sense of the Term.

Although the court below purportedly accorded to appellants a "trial" as required by law, no trial in the true sense of that term was in fact had.

As we have stated the trial court, upon the filing of the Information in this case, issued an order to show cause as to why appellants should not be adjudged guilty of criminal contempt [R. 17].

On December 8, 1947, a hearing was held upon that order. At this hearing, the Government introduced evidence in the form of exhibits, including a stipulation of facts as to each of the counts of the Information [R. 46-55, 18-20].

The Government attorney stated that he thought the trial would be "obviated" by the stipulation [R. 46].

The court considered the documentary evidence and a stipulation of facts, and concluded that appellants had not purged themselves of contempt, and ordered that a trial be held [R. 53]. December 19 was then agreed upon as the trial date, whereupon the court indicated that it "would like an opportunity to study this evidence that has been presented, before proceedings here" [R. 54].

Then the court stated:

> "I assume that what has been offered and received here, the exhibits, including the stipulation, represents the return to this order to show cause and may be deemed in evidence upon the trial; is that right?"

The court stated finally:

> "The evidence introduced here this afternoon will be part of the evidence upon the trial now set for December 19th at 10:00 o'clock."

On December 19 the "trial" was held [R. 55 ff.].

The Government's case, when presented, comprising less than twenty lines in the record [R. 55-56], consisted solely of the introduction of the documents previously received in evidence at the show-cause hearing [R. 55-56]. Appellant Colgrove then testified on behalf of himself [R. 56-66].

The injunctions were not introduced in evidence, nor were the documents or evidence upon which the injunctions were based.

A criminal contempt proceeding is not part of the original cause. (*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 445, 446.) Nothing in the original cause was part of the record in the criminal contempt proceeding below.

Proof of criminal intent and wilfulness are wholly lacking from the Government's case thus made. Likewise absent is any proof of insufficiency of labeling under the Act.

Moreover, this "evidence" the court had already accepted at the hearing upon the show-cause order, in which it had concluded that appellants had not "purged" themselves of contempt.

There was plainly no trial here, since all that the court did was to go through formalities representative of a trial, but to which the court in fact must have come, since it knew the evidence, with a preconceived conclusion as to appellants' guilt, and a preview and preliminary study of all the "evidence" in the case.

In fact, counsel for the Government stated that he did not feel that lengthy argument was necessary because "I know that your honor * * * has had the opportunity to study the file and has heard the matter without a jury" [R. 66].

Manifestly the December 19th proceeding did not rise to the dignity of a trial as guaranteed by the laws and the Constitution of the United States.

What the Judge should have done, we submit, was to refer the matter for trial to another Judge of the court, and not try the cause himself, especially since the court had already heard the evidence against appellants and had, at the show-cause hearing, reached a conclusion adverse to them on the merits, prior to the trial below.

C. The District Court Had No Jurisdiction to Enter the Judgment in This Case Since the Judgment Is Based Both Upon Alleged Contempts and Upon Alleged Violations of Law in the Commission of "Offenses."

The judgment entered against appellants by the court below recites that they were convicted of "the offenses" of having, on given dates, "shipped in interstate commerce a product which failed to bear specific directions for the use of the product" [R. 36]. The judgment is also simultaneously based upon a conviction of appellants of having acted "in disregard of the injunctions" previously issued by that court [*id.*].

Manifestly the court below had no jurisdiction in this case to enter any judgment based upon any alleged commission of an "offense" in the shipment in interstate commerce of any articles prohibited under the food and drug law. To reach and convict a person of such an offense, a criminal proceeding was required, with all the formalities of an indictment or an information, an arraignment, pleas, setting for trial, and a full criminal trial. None were present here.

The "Information re Contempt (Criminal)" issued by the United States Attorney in this case is an instrument which purports to inform the court of the alleged acts upon which criminal contempt proceedings and findings are sought to be predicated, but at the same time the document is couched in terms present in criminal informations. It states in part that "the United States Attorney Charges," and contains nine separate "counts." Each "count," however, concludes with an allegation of criminal contempt, and the entire document ends with a "Wherefore" clause, seeking an order to show cause [R. 15].

Appellants in this case could not tell with any degree of certainty whether they were being charged with the commission of nine separate crimes by this instrument, or called upon to answer allegations of criminal contempt. They certainly were entitled to greater certainty in the charges. (See, *e. g., United States v. Cruikshank,* 92 U. S. 542, 23 L. Ed. 588.)

Then, since the "Information" in the case and the proceedings that followed it did not conform to the requirements of criminal proceeding, no finding of the commission of "offenses" in violation of the Act, and no conviction of any offenses could be made by the trial court.

The judgment below is thus defective and beyond the jurisdiction of the court below upon the proceedings before it, and should be set aside.

POINT VI.

There Can Be No More Than One Count for Contempt.

In *Carter v. U. S.,* 135 F. 2d 858 (C. C. A. 5), a sentence of both fine and imprisonment was imposed. The court took cognizance of the fact that the statute provided for punishment in the alternative, even though not assigned as error, and said:

> "It is true that the evidence discloses more than one act of contempt and if two acts had been separately prosecuted and guilt found as to each, one of them might have been punished by fine and one by imprisonment. * * * (Citing the Hoffman case, *supra.*) But here there was only one general charge of contempt, one verdict of guilty, and one judgment. * * *"

The judgment was reversed and sent back to the District Court for further proceedings. This case followed the case of

In re Bradley, 318 U. S. 50, where the Supreme Court discharged the petitioner from custody of the imprisonment portion of a judgment for contempt on the ground that having been both fined and imprisoned when the statute provided but for one or the other, and the fine having been paid, the defendant was entitled to his release.

And in *Rapp v. U. S.,* 146 F. 2d 548, the Circuit Court of Appeals for the Ninth Circuit affirmed a judgment convicting the appellant of six counts of contempt in charging and receiving rents in excess of the ceiling from six different tenants.

See also *Hoffman v. U. S.,* 13 F. 2d 278, holding similarly.

In *People v. Stephens,* 79 Cal. 428, it is said:

> "The essential element of the offense was the same act in both cases. In *Regina v. Erlington,* 9 Cox C. C. 86, Cockburn, C. J., said: 'It is a fundamental rule of law that out of the same facts a series of charges shall not be preferred.'
>
> Bishop says: 'To give our constitutional provision the force evidently meant, and to render it effective, "the same offense" must be interpreted as equivalent to the same criminal act.' (1 Bishop's Crim. L. 1060.) 'The state cannot split up one crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.' (*Jackson v. State,* 14 Ind. 327.)"

POINT VII.

The Sentences Were Excessive.

The sentences in this case were clearly excessive.

As we have demonstrated above, the injunction, even if it were within the power of the court below to issue, was ambiguous to the point that the court itself stated that appellants obeyed it as written, but not in its spirit.

Conclusion.

The court was without jurisdiction to issue the order; newspaper advertising is not forbidden by the statute; the procedure and proceeding was null and void; the evidence was insufficient to support the verdicts and judgments of the court; the judgments were excessive and beyond the jurisdiction of the court. THEREFORE, they should be reversed and set aside, with directions to dismiss the case.

Respectfully submitted,

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Attorney for Appellants.